A

CIMB BANK BHD

v.

LIM SENG & ORS AND ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUITS NO: D-22-1462-2008 & 22NCC-579-2011]
10 NOVEMBER 2011

C

BANKING: *Loan facility - Term loan and fixed loan facilities - Default in repayment - Whether bank had agreed to a variation of terms of loan - Whether bank entitled to revert to its full rights and remedies under original loan agreements - Whether statement of account and certificate of indebtedness conclusive proof of borrower's indebtedness - Whether auction*

D

of properties provided as collateral was wrongful and invalid - Whether borrower not notified of public auction - Whether chargor failed to comply with procedure for challenging validity of the decision of the land administrator - Whether chargor barred from raising validity of auction

E

CONTRACT: *Loan - Security for loan - Charge - Sale of land - Public auction - Whether auction of properties provided as collateral for bank loan wrongful and invalid - Whether borrower not notified of public auction - Whether chargor failed to comply with procedure for challenging validity of the decision of the land administrator - Whether chargor*

F

barred from raising validity of auction - National Land Code, 1965 s. 418

LAND LAW: *Charge - Public auction - Whether auction of properties provided as collateral for bank loan wrongful and invalid - Whether borrower not notified of public auction - Whether chargor failed to comply*

G

with procedure for challenging validity of the decision of the land administrator - Whether chargor barred from raising validity of auction - National Land Code 1965, s. 418

The plaintiff had given a term loan to the defendants for the sum

H

of RM480,000 ("the Selayang Loan") secured over a legal charge created over a property in Selayang. As a result of the defendants' default the said property was auctioned for RM810,000. The auction price was more than enough to cover the amount outstanding and left a surplus of RM22,650.20 which the court

I

had ordered to be paid to the defendants. The defendants also obtained a fixed loan of RM315,900 ("the Rawang Loan") from

the plaintiff, secured by a loan agreement cum assignment of a bungalow land in Rawang. The Rawang property was sold at a public auction for RM310,000 as a result of the defendants' default. Clause 15 of the Rawang Loan Agreement cum Assignment provided that the defendants had to pay to the plaintiff any shortfall after the auction of the property. Hence, the plaintiff claimed for the shortfall of RM285,605.80. The defendants claimed that both the term loan facility and the fixed loan facility had been consolidated to a combined sum of RM620,000 only *vide* the plaintiff's letter dated 5 December 2006. The plaintiff contended that the letter of 5 December 2006 was a settlement offered to the defendants on a strictly without prejudice basis to enable the defendants to settle their debts under both the loan facilities but the defendants had failed to keep up with the repayments as provided in the said letter. Hence, the plaintiff claimed to be entitled to revert to its full rights and remedies under the original loan agreements between the parties. The plaintiff claimed for the amount outstanding under the loan facilities. The defendants counterclaimed for a declaration that the auction of the properties was wrongful and invalid. The defendants claimed that they were not notified of the public auction of the Rawang property. The defendants also prayed for damages.

Held (allowing plaintiff's claim; dismissing defendants' counterclaims with costs):

(1) The plaintiff had made it amply clear to the defendants that if they did not make the revised instalment payments on the revised dates due, the plaintiff shall revert to enforce its full rights under the original agreements. There was nothing unusual with such a clause. The defendants failed to make the revised instalment payments and so the plaintiff proceeded with its full rights under the original agreements. (para 14)

(2) It could be clearly seen from the 1st defendant's own letter there was already an admission to the fact that he had received the notice of the auction to be held on 29 October 2005. In any event, under the loan agreement cum assignment by cl. 14 thereof, there was no requirement that the borrowers must be notified of the auction. It was very obvious that the defendants were aware that the public auction had

A been carried out and that the Rawang property had long been sold and its sale completed before the settlement proposal dated 5 December 2006. (paras 20-22)

(3) A detailed statement of account and a certificate under
B s. 90A of the Evidence Act 1950 were tendered in court to prove the amount outstanding. Furthermore, cl. 39 of the annexure to the charge provided that the statement of account of the chargor(s) shall be conclusive proof of the indebtedness of the chargor(s). By the same token, the
C shortfall sum of RM285,605.80 had also been proved through a certificate of indebtedness. In the absence of any manifest error being shown by the defendants, the defendants were bound by the certificate of indebtedness. (paras 27 & 32)

(4) The defendants had not filed any action to dispute the validity
D of the auction of the Selayang property. The relevant provision applicable to any challenge against the decision of the land administrator is governed by s. 418 of the National Land Code. The defendants had not complied with the procedure for appeal and were barred from raising the validity of the
E auction of the Selayang property in this court. (paras 37 & 38)

Case(s) referred to:

Bangkok Bank Bhd v. Chuan Kee Company Sdn Bhd [2000] 1 CLJ 766
F *HC* ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Citibank NA v. Ibrahim Othman [1993] 1 LNS 104 HC ***(refd)***

OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd [2000] 6 CLJ 158 HC ***(refd)***

RHB Bank Bhd v. Tan Swee Long Holdings Sdn Bhd & Ors [2008] 10 CLJ
G *519 HC* ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 90A

National Land Code, s. 418

H *For the plaintiff - TJ Lee (Ang Soon Roy with him); M/s Zairina Loh & Wong*

For the defendants - In person

Reported by Amutha Suppayah

I

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Here is a case where when the plaintiff bank sued the defendants borrowers for the amount outstanding after their respective properties have been auctioned off for default in the instalment payments, the borrowers counterclaimed against the bank for wrongful and invalid sale of the properties and for the return of the estimated value of the properties besides damages to be assessed.

Parties

[2] By an order of court in Kuala Lumpur High Court dated 3 September 1999, all the assets and liabilities of BBMB Kewangan Berhad were vested in Bank of Commerce (M) Berhad. Bank of Commerce (M) Berhad later changed its name to Bumiputra-Commerce Bank Berhad on 30 September 1999. Bumiputra-Commerce Bank Berhad later changed its name to the plaintiff that is CIMB Bank Berhad on 7 September 2006.

[3] BBMB Kewangan Berhad extended a term loan to the defendants on 15 July 1997 under a loan agreement for the sum of RM480,000 subject to the terms and conditions therein. The said loan (the Selayang Loan) was secured over a legal charge created over a three storey shop office in Selayang in favour of the BBMB Kewangan Berhad and as a result of the defendants' default the said property was auctioned at the Gombak Land Office on 31 December 2009 for RM810,000. The auction price was more than enough to cover the amount outstanding and indeed left a surplus of RM22,650.20 which the court at the end of the trial in the 2008 suit ordered the said sum together with interest at the rate of 4% per annum to be paid to the defendants from 23 April 2010 to date of realisation.

[4] The defendants also obtained a fixed loan of RM315,900 (the Rawang Loan) from BBMB Kewangan Berhad and this time secured by an Loan Agreement cum Assignment dated 14 May 1997 of a piece of property which is a bungalow land in Rawang in favour of BBMB Kewangan Berhad as the individual title to the property has not been issued yet. The Rawang property was sold at a public auction on 29 October 2005 for RM310,000 as a result of the defendants' default in the loan.

A **Problem**

[5] Clause 15 of the Rawang Loan Agreement cum Assignment provided that if there is a shortfall after the auction of the property, the defendants shall pay to the plaintiff the shortfall
B together with the prescribed interest.

[6] The plaintiff claimed in the 2011 suit for the shortfall of RM285,605.80 together with interest and cost.

[7] The defendants alleged in their defence and counterclaim
C filed in both the 2008 and 2011 suits that both the term loan facility and the fixed loan facility had been consolidated to a combined sum of RM620,000 only *vide* the plaintiffs letter dated 5 December 2006. The plaintiff contended that the plaintiff's letter of 5 December 2006 is a settlement offered to the defendants on
D a strictly without prejudice basis to enable the defendants to settle their debts under both the term loan (Selayang Loan) and the fixed loan (Rawang Loan) at the sum of RM620,000 but that the defendants had failed to keep up with the repayments as provided in the said letter.

E

[8] As the defendants had breached the terms and conditions of the said letter the plaintiff was therefore entitled to revert to its full rights and remedies under the loan agreement and the loan agreement cum assignment between the parties.

F **Prayer**

[9] Whilst the plaintiff claimed for the amount outstanding under the term loan in suit 2008 and under the fixed loan in suit 2011, the defendants filed their counterclaims in both suits. In the 2008
G suit the defendants prayed for a declaration that the auction of the Selayang property was wrongful and invalid and/or that the Selayang property be returned to the defendants. They also prayed for loss of the Selayang property which is estimated at RM1,2000,000 and/or the loss of use of the Selayang property
H estimated at RM300 per day from the date of auction and continuing besides general damages to be assessed with interest and costs.

[10] The defendants' counterclaim in the 2011 suit was that they
I were not notified of the public auction of the Rawang property and so they prayed for a declaration that the auction of the Rawang property wrongful and invalid and an order for the

Rawang property to be returned to the defendants. The defendants also prayed for loss of the Rawang property estimated at RM600,000 and/or loss of daily use of the said property estimated at RM200 per day from the date of auction to realisation besides damages to be assessed, interest and costs.

Parol and Paper Evidence

Whether The Plaintiff Was Entitled To Enforce Its Rights Under The Original Loan Agreement And Loan Agreement Cum Assignment If The Settlement Terms Were Not Fulfilled By The Defendants.

[11] The then Assistant Vice President of the plaintiff, Miss Marlina Ling Hie gave evidence on behalf of the plaintiff as PW1. She testified that the plaintiff had by its letter dated 6 November 2006 (exh. P16) at pp. 203-204 of bundle D (plaintiff's bundle of documents) offered the defendants a settlement on a strictly without prejudice basis and subject to the terms and conditions therein. The whole of the said letter from the plaintiff to the defendants is reproduced below for an appreciation of the full terms and conditions

Our Ref : GSR/MLH/ZMA/14140020049957 & 14140020232952

Date : 6 November 2006 - WITHOUT PREJUDICE

Lim Seng @ Lam Ngan
Lim Yin Hee
Lim Yong Piao
No. 37 Jalan2/16
Bandar Baru Selayang
68100 Batu Caves
Selangor

Dear Sirs

Re : Account No: 1) 14140020409957 - RM204,401.96 @ 31 October 2006
2) 14140020232952 - RM576,823.89 @ 31 October 2006

Borrower(s): 1) Lim Seng @ Lam Ngan
2) Lim Yin Hee
3) Lim Yong Piao

Rescheduling of Payment

We refer to our discussion and your proposal dated 2 November 2006.

After due consideration, we are pleased to inform that our Management has approved the new arrangement subject to the following terms and conditions:

(1) To reschedule both the accounts to RM620,000 with interest under the original Letter of Offer and Facility Agreement executed by you;

(2) To forward lump sum payment of RM20,000 on or before 31 January 2007;

(3) The new monthly instalment amount is RM8,000 per month commencing on 30 November 2006 until loan settlement;

(4) All monthly instalments shall be made on or before 30th without any prior demand to you;

(5) In the event you default any of the above terms and conditions, you shall be deemed to have revoked this new arrangement and we shall instruct our solicitor to stop proceeding to enforce our rights pursuant to the original Facility Agreement;

(6) Notwithstanding the above, you hereby agree and understand that this new arrangement shall not be in substitution and/or variation of the terms and conditions in the original Facility Agreement.

The above indulgence is strictly on a without prejudices basis to all our rights and entitlements under the Letter of Offer and executed by you.

Kindly acknowledge acceptance of the above terms and conditions herein by signing and returning the enclosed duplicate letter within seven days from the days hereof failing which this offer shall be deemed to be (sic) lapsed.

Yours faithfully,

for CIMB BANK BERHAD (13491-P)

(Formerly known as Bumiputra-Commerce Bank Berhad)

Group Special Recovery

sgd	sgd
...	...
Zabidi Mohamed Akib	Marlina Ling
Recovery Officer	Assistant Vice President

ACCEPTANCE OF RESCHEDULING OF PAYMENT

We, hereby unequivocally and unconditionally accept all the above terms and conditions.

...	...
Name : Lim Seng @ Lam Ngan	Name : Lim Yin Hee
NRIC No:	NRIC No:
Date :	Date :

...
Name : Lim Yong Piao
NRIC No:
Date :

[12] The above letter of 6 November 2011 was accepted with some modifications by the defendants on the plaintiff's revised offer letter of settlement dated 5 December 2006 duly accepted by the defendants. The said letter marked as exh. P17 at pp. 205-206 of bundle D is reproduced below for an appreciation of its full terms and conditions.

Our Ref : GSR/CONS/527/14140020049957 & 14140020232952

Date : 05 December 2006

Lim Seng @ Lam Ngan
Lim Yin Hee
Lim Yong Piao
No. 37Jalan2/16
Bandar Baru Selayang
68100 Batu Caves

'WITHOUT PREJUDICE'

Selangor

Dear Sirs

Re: Account No: 1) 14140020409957 - RM204.401.96 @ 31.10.2006
2) 14140020232952 - RM576,823.89 @ 31.10.2006

Borrower(s): 1) Lim Seng @ Lam Ngan
2) Lim Yin Hee
3) Lim Yong Piao

Rescheduling of Payment

We refer to and your letter dated 22 January 2006

After due consideration, we are pleased to inform that our management has approved/reviewed the new arrangement subject to the following terms and conditions:

(1) To reschedule both the accounts to RM620,000 and to waive the interest before 28 February 2007.

(2) To extend the commencement date to 28 February 2007 for the upfront payment of RM20,000 together with the new monthly instalment of RM8,000 until full settlement of the accounts.

(3) To pay RM4,000 in December 2006 and January 2007.

(4) All the terms and conditions except paras 1, 3, 4, 5 & 6 of our convey letter dated 06 November 2006 remain unchanged.

The above indulgence is strictly on a without prejudice basis to all our rights and entitlements under the Letter of Offer and executed by you.

Kindly acknowledge acceptance of the above terms and conditions herein by signing and returning the enclosed duplicate letter with in seven days from the days hereof failing which this offer shall be deemed to be lapsed.

Yours faithfully,

for CIMB BANK BERHAD (13491-P)

(Formerly known as Bumiputra-Commerce Bank Berhad)

Group Special Recovery

sgd	sgd
...	...
Zabidi Mohamed Akib	Marlina Ling
Recovery Officer	Assistant Vice President

ACCEPTANCE OF RESCHEDULING OF PAYMENT

We, here by unequivocally and unconditionally accept all the above terms and conditions.

sgd	sgd
...	...
Name : Lim Seng @ Lam Ngan	Name : Lim Yin Hee
NRIC No: 421101-08-5089	NRIC No: 750813-08-6255
Date : 12/12/2006	Date : 12.12.06

sgd

...
Name : Lim Yong Piao
NRIC No: 710226086115
Date : 12/12/2006

[13] I can accept the explanation of PW1 that there has been a typographical error in that to make sense of para. 4 of the letter of 5 December 2006 it should read as follows:

> (4) All other terms and conditions at paras. 1, 3, 4, 5 & 6 of our convey letter dated 06 November 2006 remain unchanged.

[14] I am left in no doubt that none of the defendants were misled or prejudiced in any way as the only witness for the defendants ie, the 1st defendant did not say how he had been misled. All he stated was that the plaintiff cannot have the best of both worlds and have the cake as well as eat it. By that he meant that if the plaintiff had agreed to grant a hair-cut to the defendants, then the plaintiff cannot revert back to the original terms in the loan agreement and the loan agreement cum assignment. Whether or not the plaintiff can revert back to the original terms in the loan agreement and loan agreement cum assignment depends on the terms and conditions agreed upon. Here I agreed that PW1 has made it amply clear to the defendants that if they do not make the revised instalment payments on the revised dates due, the plaintiff shall revert to enforce its full rights under the original agreements and the letter of offer. There is nothing unusual with such a clause. The defendants failed to make the revised instalment payments and so the plaintiff proceeded with its full rights under the letter of offer as well as the original loan agreement and loan agreement cum assignment.

Whether The Defendants Have Been Duly Notified Of The Public Auction Sale Of The Rawang Property

[15] One Rozilah binti Ibrahim who was the Assistant Vice President of the plaintiff gave evidence as PW2. She had personal knowledge of the recovery of the loan facilities granted to the defendants. She gave evidence that on 17 October 2005 the 1st defendant had come to see her and that she had informed him that his proposal for settlement had been rejected by the plaintiff. She said that on the same day she handed the 1st defendant a

copy of the auction catalogue wherein the Rawang property had been listed for auction on 29 October 2005. The auction catalogue is marked as exh. P22 at pp. 1-3 of bundle E.

[16] Even in the 1st defendant's own letter undated but received by the plaintiff on 28 October 2005 he referred to the fact that:

> Twice the time, I also sent letter for the purpose waiting for your reply until 26 October 2006 9.30am. I refer to the two copies of documents from Rozilah Binti Ibrahim (pengurus) among one copy is ref no. 27831510/mr. The other one is the catalogue of auction on 29 October 2005.

[17] Therefore it can be clearly seen from the 1st defendant's own letter there is already an admission to the fact that he had received the notice of the auction to be held on 29 October 2005.

[18] PW2 also produced in court a letter from the plaintiff to the 1st defendant dated 14 October 2005 marked as exh. P24 stating as follows:

> Please be informed that the request has been rejected and the bank has decided as follows:
>
> (a) To remain as per earlier decision dated 9 August 2005.
>
> (i) To pay RM80,000 by 24 October 2005.
>
> (ii) Thereafter to continue RM6,000 per month until full settlement of the arrears.
>
> (b) Payments are received on 'Without Prejudice Basis'.
>
> (c) Failing which to proceed with auction on 29 October 2005 without any further notice.

[19] The said letter had been signed by PW2.

[20] There was also the corroborative evidence of the reply of the plaintiff's then solicitors Raslan Loong to the 1st defendant dated 22 November 2005 which dealt with the same complaint by the 1st defendant. The said letter is marked exh. P18 and it is important enough to be reproduced below as it dispels the notion of the defendants that they were not aware at all about the auction of the Rawang property:

> We note your grievance in regards to the sale of the abovementioned property *via* auction on 29 October 2005.

Your allegation that you were not notified of the auction is unfounded and misconceived. By a Notice of Demand and Notice to Deliver Vacant Possession dated 23 September 2005, you have been put on notice that if you failed to satisfy the sum of RM472,195.97 as at 23 September 2005 within fourteen (14) days from the date of the letter, you were to deliver vacant possession of the property to our client, failing which our client would proceed to foreclose your property without further reference to you.

Upon receipt of our Notice of Demand and Notice to Deliver Vacant Possession dated 23 September 2005, our client received a proposal by you on 11 October 2005 wherein you proposed that you will repay the outstanding amount by way of instalments of RM3,000 per month starting October 2005. Our client rejected this proposal and stated that it was prepared to settle this matter on the following terms:

(a) To pay RM80,000 by 24 October 2005 and thereafter to continue payment of RM6,000 per month until full settlement of the arrears;

(b) Payments were to be made on a "Without Prejudice" basis; and

(c) Failing which, our client would proceed with the auction on 29 October 2005 without any further notice to you.

You the met with Puan Rozilah, the Centre Manager on 17 October 2005, who informed you that your proposal had been rejected by the bank and the bank would proceed to auction on 29 October 2005; a copy of the auction catalogue was also handed to you on the same day. Subsequently the bank also informed you in writing via a letter dates 24 October 2005 that your proposal had been rejected.

Therefore, you had been given due notice that the property would be put up for auction on 29 October 2005 and your allegations of 'cheating' or 'deception' are totally unfounded ...

In conclusion, you had, at all material times, knowledge that the property was to be auctioned on 29 October 2005. You had been given due notice of the auction, and the auction was carried out with due compliance of procedure and there is neither 'deceit' or 'deception' on either the part of our client or its lawyers.

[21] In any event under the loan agreement cum assignment by cl. 14 thereof there is no requirement that the borrowers must be notified of the auction for the clause at (b) reads:

> Upon default by the borrower(s) in the manner in cl. 13 hereinbefore provided the lender shall be entitled to exercise all or any of the rights and powers following: ...
>
> (b) the right and power to sell and assign the said property as the absolute unencumbered owner thereof at such price or prices and in such manner as the lender shall in its absolute discretion think fit.

[22] The defendants also contended that they were unaware of the fact that the Rawang property had been sold by public auction when they signed the settlement letter of 5 December 2006 on 12 December 2006. In fact the 1st defendant went so far as saying that PW1 represented to him on the meeting on 12 December 2006 that at that time the Rawang property had not been auctioned yet. This is not credible not just because of the reply by Raslan Loong dated 29 June 2006 exh. P18 but also because of Raslan Loong's reply to the defendants' solicitors M/s Shamsuddin & Co letter dated 23 March 2006 alleging that the plaintiff had failed to provide proof of proper service of legal notice prior to the public auction on 29 October 2005. The said letter from M/s Shamsuddin & Co is marked as exh. P21 at pp. 199-200 of bundle D and Raslan Loong's reply of 29 June 2006 is at pp. 201-202 of bundle D. The knowledge of the solicitors is knowledge of the clients as well. I agree with PW1 that as such, it was very obvious that the defendants were aware that the public auction had been carried out and that the Rawang property had long been sold and its sale completed before the settlement proposal dated 5 December 2006.

[23] In any event the caption to the settlement letter referred to the amount outstanding under the fixed loan (Rawang property) as RM204,401.96 as at 31 October 2006 which is much less than the amount outstanding of RM472,196.97 as at 23 September 2005 as stated in exh. P18, being letter from Raslan Loong to the 1st defendant dated 22 November 2005. Surely the 1st defendant would have been aware if he had made any payments towards reduction of the loan. The reduced figure can only be arising out of the shortfall after taking into consideration the sale proceeds received from the successful auction of the Rawang property.

[24] There was also another piece of evidence from the 1st defendant himself which destroyed his credibility totally where his assertion is concerned that he was not aware on 12 December 2006 that the Rawang property had not been auctioned off. The 1st defendant had written to Diamond Realty *vide* his letter of 17 March 2005 (exh. P19 at p. 197 of D) which was erroneously dated as such when it should have been correctly dated 17 March 2006 as the said letter was received by the auctioneer on 22 March 2006 alleging that he had never authorised the said agent to sell the Rawang property. The agent Diamond Realty replied by their letter of 22 March 2006 that they had been duly appointed by Bumiputra Commerce Bank Berhad to see bidders for the Rawang property (exh. P20 at p. 198 of D).

[25] The 1st defendant must have been labouring under some serious misapprehension as to what had happened for he had asserted that the plaintiff had committed a criminal breach of trust by auctioning off the Rawang property and had proceeded to lodge a police report against the plaintiff to this effect on 6 August 2011. Needless to say this was not the only police report lodged against the plaintiff by the 1st defendant.

[26] The 1st defendant argued that even if he had received notice of the auction, his two children the 2nd and 3rd defendants had not received the notice. However the only person who testified for the defendants was the 1st defendant alone. The 2nd and 3rd defendants have stayed away and they had not come to testify that they had not received notice of the intended auction. In any event as I have held, notice even if it had not been served formally is not fatal as provided under cl. 13 and 14(b) of the loan agreement cum assignment (exh. P3 pp. 141-178 of D). Clause 13 stipulated that upon default by the defendants, the whole of the principal amount of the loan and interest thereon shall become due and immediately repayable and the plaintiff as the lender shall forthwith become entitled to exercise the rights and powers upon default without any notice. Clause 14 provides that the plaintiff has the right and power to sell and assign the assigned property as the absolute unencumbered owner at such price as the plaintiff deems fit.

[27] At any rate the 1st defendant had been dealing with the plaintiff not only on his own behalf but also on behalf of the 2nd and 3rd defendants who are his children and his knowledge of the notice of auction is their knowledge as well.

Whether The Plaintiff Has Proved On A Balance Of Probabilities The Amount Outstanding

[28] The plaintiff had claimed that under the term loan (Selayang Loan) there was the sum of RM661,023.15 outstanding as at 27 June 2008 together with interest at the rate of 0.75% per annum above base lending rate (that is 6.75% on 27 June 2008) on monthly rests until full payment. A detailed statement of account (exh. P13 at p. 55 of D) and a certificate under s. 90A of the Evidence Act 1950 (exh. P14 at p. 56 of D) were tendered in court to prove the amount outstanding in the 2008 suit. Furthermore cl. 39 of the annexure to the charge provides that the chargor(s) hereby agree(s) that a statement of account of the chargor(s) signed by the General Manager, Deputy Manager, Assistant Manager, Sub-Manager, Accountant, Senior Credit Officer or any other authorised officer of the chargee shall be conclusive proof of the indebtedness of the chargor(s).

[29] His Lordship Mahadev Shankar J (as he then was) in *Citibank NA v. Ibrahim Othman* [1993] 1 LNS 104; [1994] 1 MLJ 608 at p. 615 observed:

> ... A bare denial of a debt was never enough. The chargor also has an onus if the denies the amount claimed to say how much he admits owing ...

[30] In a similar vein His Lordship Kamalanathan Ratnam J in *Bangkok Bank Bhd v. Chuan Kee Company Sdn Bhd* [2000] 1 CLJ 766; [2000] 2 MLJ 113 at p. 114 said:

> (3) The plaintiff had clearly given the details of the amount claimed as set out in the affidavit in support of the application and in the further affidavit. The defendant did not give any particular sum it was challenging nor did the defendant give any evidence whatsoever that the sums claimed by the plaintiff were wrong in any material particular ...
>
> (5) What is import ant is that there was no evidence to show that the amount claimed was incorrect. Based on authority, the court accepted the plaintiff's reliance upon the conclusive evidence clause.

[31] His Lordship PS Gill J, (as he then was) in *OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd* [2000] 6 CLJ 158; [2000] 6 MLJ 372 at p. 373 also expressed the same approach towards assessing evidence of the amount outstanding as asserted by the plaintiff bank in the light of a bare denial by the borrower:

(3) It is permissible for more than one affidavit to be filed in this type of case because invariably the matter could not be disposed of on the first return date. Provided evidence of the correct amount due has been put before the hearing date, the court had the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice would result to the defendant. The defendant's affidavit in reply which contained a general denial the amount owing was not enough to raise a cause to the contrary. As the defendant denied the amount claimed, they had an onus to say how much they admitted owing. On the facts, the affidavit of the defendant did not condescend to such particulars ...

[32] His Lordship Mohd Sofian JC (as he then was) in *RHB Bank Bhd v. Tan Swee Long Holdings Sdn Bhd & Ors* [2008] 10 CLJ 519; [2008] 3 MLJ 130 had this comment to make on the effect of a certificate of indebtedness:

(3) Further, the certificate of indebtedness, after being examined in accordance with the loan and guarantee agreements respectively, were clear enough. There was nothing to suggest any manifest error on the face of the certificate nor was any fraud shown. In the circumstances, the certificate of indebtedness was conclusive proof of the debt and liability of the defendants ...

[33] Finally the Federal Court speaking authoritatively through His Lordship Steve Shim CJ of Sabah and Sarawak in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 at p. 546 observed:

(3) A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim ...

(4) There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. In the circumstances and given the authorities cited, the answer to the first question must be in the affirmative where as the second question had to be answered in the negative ...

[34] By the same token the shortfall sum of RM285,605.80 as at 17 February 2011 together with interest at the rate of 0.75% per annum above base lending rate (that is 6.30% on 17 February 2011) on monthly rests until full payment in accordance with cl. 15 of the loan agreement cum assignment has also been proved through a certificate of indebtedness prepared by PW1 and

tendered and marked as exh. P15 at p. 207 of D. Clause 35 of the loan agreement cum assignment speaks of the final and conclusive effect of such a certificate of indebtedness. PW1 had further testified that the amount stated is the amount due and owing after the plaintiff had taken into consideration the proceeds from the successful auction of the Rawang property on 29 October 2005. I agree with learned counsel for the plaintiff that in the absence of any manifest error being shown by the defendants the defendants are bound by the certificate of indebtedness in exh. P15.

Whether The Public Auction Under The National Land Code 1965 Of The Selayang Property Had Been Properly Carried Out

[35] The defendants had made the following allegations which were not supported at the trial. First that the charge document for the Selayang property was incomplete and is a false document. Second the Land Administrator of the Gombak Land Office was biased in favour of the plaintiff.

[36] With respect to the allegation of incomplete charge document by the defendants, PW1 had testified that the charge document marked as exh. P26 (which is identical to exh. P4, except for p. 14 in exh. P4 which was accidentally printed on the plaintiff's letterhead) was a complete document. The defendants' scurrilous and spurious allegation that the charge document is incomplete and is a false document is totally devoid of any merits.

[37] As for the defendants' allegation that the land administrator was biased in favour of the plaintiff, the 1st defendant admitted during cross-examination that there is nothing before the court to prove that the said land administrator was biased. The defendants have not filed any action to dispute the validity of the auction of the Selayang property. The relevant provision applicable to any challenge against the decision of the land administrator must surely be governed by s. 418 of the National Land Code 1965 which reads:

> 418. Appeals to the court
>
> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

[38] The defendants have not complied with the procedure for appeal and are barred from raising the validity of the auction of the Selayang property in this court.

Pronouncement

[39] Based on the reasons given above I gave judgment for the plaintiff for the sum of RM285,605.80 as at 17 February 2011 together with interest at 0.75% per annum above base lending rate (that is 6.30% on 17 February 2011) on monthly rests until full payment for the 2011 suit.

[40] As for the 2008 suit evidence was led that the Selayang property has subsequently been sold and there had been a surplus of RM22,650.20 which sum I ordered to be paid out to the defendants with interest at 4% per annum from 23 April 2010 as per the plaintiff's statement dated 8 August 2011 showing the detailed calculation as at 23 April 2010 marked as exh. P25. The said sum had earlier been kept in a suspense account and had not been credited to the defendants then as they had defaulted in the Rawang Loan.

[41] I also ordered costs to be paid by the defendants to the plaintiff for the plaintiff's claim.

[42] Based on the reasons given above I also dismissed both the counterclaims of the defendants in 2008 suit and 2011 suit with costs.